Leader Cable Industry Bhd v Tiong Nam Trading & Transport (M) Sdn Bhd (Ramachandran Naidu & Anor as third parties)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1-23-41 OF 1994
MOHD SAARI J
16 FEBRUARI 2000

Insurance Law *— Construction of policy — Indemnity claim against insurer — Plaintiff sued defendant as carrier of goods — Consent judgment entered without insurer's approval —Defendant claimed against insurer — Meaning of 'legally liable' — Whether insurer liable to indemnify defendant*

The plaintiff had engaged the defendant, a carrier company, to convey machineries from its factory to a project site. On 10 February 1993, the motor lorry loaded with the plaintiff's machineries overturned, resulting in the damage to the machineries. The plaintiff filed this suit against the defendant for damages under the contract of bailment. The defendant in turn filed a third party claim against the driver and the insurer/Commercial Union Assurance (M) Sdn Bhd. On 23 April 1998, the plaintiff and the defendant entered into a consent judgment whereby the defendant agreed to pay the plaintiff RM100,000 as damages and RM10,000 as cost. The present dispute is regarding the third party claim against Commercial Union/insurer. Under the policy, the underwriters agree to indemnify the assured for any sum or sums paid by the assured to the owners of the goods carried by reason of the assured becoming legally liable. The issue is whether Commercial Union is liable to indemnify the defendant.

Held:

(1) The words 'legally liable' were equivalent to 'responsible in law' and in the context of liability insurance, ordinarily means liability to pay a definite sum imposed by a final judgment against an insured or by an award or a settlement by way of an agreement (see p 664A–B); *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165 followed.

(2) The insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. His liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement (see p 664C–D); *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 followed. In this regard, the words 'by agreement' refers to a settlement reached between the insured and the injured person but with the consent of the insurer. Commercial Union never agreed to the consent judgment entered into by the defendant and the plaintiff. Therefore, Commercial Union cannot be said to be liable to indemnify the defendant (see p 664E–F).

[Bahasa Malaysia summary

Plaintif telah mendapat khidmat defendan, suatu syarikat pengangkutan, untuk memindahkan jentera-jentera dari kilangnya ke suatu tapak projek. Pada 10 Februari 1993, motor lori tersebut yang membawa jentera-jentera plaintif telah terbalik, menyebabkan kerosakan kepada jentera-jentera. Plaintif telah memfailkan tindakan ini terhadap defendan untuk ganti rugi di bawah kontrak bailmen. Defendan pula memfailkan tuntutan pihak ketiga terhadap pemandu dan penginsuran/Commerial Union Assurance (M) Sdn Bhd. Pada 23 April 1998, plaintif dan defendan telah memasuki penghakiman persetujuan di mana defendan bersetuju untuk membayar plaintif sebanyak RM100,000 sebagai gantti rugi dan RM10,000 sebagai kos. Pertikaian kini adalah berkenaan tuntutan pihak ketiga terhadap Commercial Union/penginsuran. Di bawah polisi tersebut, pengunderait (underwriter) bersetuju untuk menanggung rugi pengambil insuran untuk sebarang jumlah atau jumlah yang dibayar oleh pengambil insuran kepada pemilik barangan yang diangkut atas alasan bahawa pengambil inusrans menjadi bertanggungan di sisi undang-undang. Isu adalah sama ada Commercial Union adalah bertanggungan untuk menanggung rugi defendan.

Diputuskan:

(1) Perkataan-perkataan 'bertanggungan secara undang-undang' adalah sama dengan 'bertanggungjawab di sisi undang-undang' dan di dalam konteks liabiliti insuran, secara biasa bermaksud liabiliti untuk membayar jumlah tertentu yang dikenakan oleh penghakiman muktamad terhadap pengambil insuran atau suatu award atau suatu penyelesaian melalui suatu perjanjian (lihat ms 664A–B); *Malaysia National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165 diikut.

(2) Pengambil insuran hanya memperolehi suatu hak mendakwa untuk wang jika liabiliti kepada pihak yang mengalami kerugian telah dibuktikan. Liabiliti kepada pihak yang mengalami kerugian mestilah dipastikan dan ditentukan wujud, sama ada melalui penghakiman mahkamah atau melalui suatu award timbangtara atau melalui suatu perjanjian (lihat ms 664C–D); *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 diikut. Berkenaan dengan ini, perkataan-perkataan 'melalui suatu perjanjian' merujuk kepada penyelesaian yang tercapai antara pengambil insuran dan pihak yang mengalami kerugian tetapi dengan persetujuan penginsuran. Commercial Union tidak pernah bersetuju kepada penghakiman persetujuan yang dimasuki oleh defendan dan plaintif. Oleh itu, Commercial Union tidak boleh dikatakan sebagai bertanggungan untuk menanggung rugi defendan (lihat ms 664E–F).]

Notes

For cases on construction of insurance policy, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 24–33.

Cases referred to

Malaysian National Insurance Sdn Bhd v Lim Tiok [1997] 2 MLJ 165 (folld)

Post Office v Norwich Union Fire Insurance Society Ltd [1967] 2 QB 363 (folld)

T Sagadaven (*Shearn Delamore & Co*) for the defendant.

M Nagarajah (*Teng Chong Moi*) (*Shook Lin & Bok*) for the insurer.

Mohd Saari J: In a third party notice (encl 19), the defendant claims against the second third party the following:

> The defendant claims against you, the second named third party an indemnity against the plaintiff's claim and the costs of this action on the grounds that you have wrongfully denied liability under the Marine Goods-In-Transit/Carrier's Liability Insurance Policy No 05 Q201582 MOC taken out by the defendant from you.

Brief facts

The plaintiff had engaged the defendant, a carrier company, to convey machineries from its factory at Sg Petani, Kedah to a project site at Bukit Kemuning Kelang, Selangor. On 10 February 1993 whilst the motor lorry WCM 5813 loaded with the plaintiffs machineries was travelling at 14½ ms KL/Kajang Rd, the lorry overturned, resulting in the damage to the machineries.

The upshot of the motor accident is that the plaintiff filed this suit against the defendant for damages under the contract of bailment. The defendant in turn filed a third party claim against the driver and the insurer/ Commercial Union Assurance (M) Sdn Bhd. Then on 23 April 1998, the plaintiff and the defendant agreed to settle the plaintiff's claim by entering into a consent judgment whereby the defendant agreed to pay the plaintiff RM100,000 as damages and RM10,000 as cost.

The defendant had withdrawn its claim against the driver. The present dispute is regarding the third party claim against Commercial Union/ insurer.

Issue

Issue for determination is whether Commercial Union is liable to indemnify the defendant.

Finding

It is not in dispute that the defendant and Commercial Union are the insured and the insurer respectively under Marine Policy No 05 Q201582 MOC (pp 9 to 14 of Exh ABD 3) ('the policy'). It is a liability policy as opposed to non-liability policy where default need not be proved. Under the terms and conditions of the said policy, the following is relevant:

> The underwriters agree to *indemnify the assured for any sum or sums paid by the assured to owners of the goods carried by reason of the assured becoming legally liable,*

> as common carrier/freight forwarder, for any claims or damages to the goods carried, where such liability is in consequence of matters arising from an accident during the period of this insurance, subject to the conditions and exclusions stated herein. (Emphasis added.)

The words 'legally liable' were equivalent to 'responsible in law' and in the context of liability insurance, ordinarily means liability to pay a definite sum imposed by a final judgment against an insured or by an award or a settlement by way of an agreement (see *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165).

In *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363, Lord Denning at p 373 said:

> The policy says that 'the company will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss of or damage to property'. It seems to me that the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. *His liability to the injured person must be ascertained and determined to exist, either by judgment of the court or by an award in arbitration or by agreement.* Until that is done, the right to an indemnity does not arise. I agree with the statement by Devlin J in *West Wake Price & Co v Ching* [1957] 1 WLR 45: 'The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss'. (Emphasis added.)

In this regard, with reference to the aforesaid judgment, the words 'by the judgment of the court' and the words 'by agreement' are significant. In the case of the former, it refers to liability which is determined by the court on merit at the end of full trial regarding the claim by the injured person against the insured. Whereas, in the case of the latter, it refers to a settlement reached between the insured and the injured person but with the consent of the insurer.

It is not in dispute that Commercial Union never agreed to the consent judgment entered into by the defendant and the plaintiff. That being so, based on ratio decidendi in *Post Office*'s case, Commercial Union cannot be said to be liable to indemnify the defendant. For the court to rule otherwise, it could be construed as if the said policy is a non-liability policy. In the result, the third party claim by the defendant against Commercial Union (the second third party) must fail.

In the premise and for reasons given above, the claim against Commercial Union (second third party) is dismissed with cost.

Claim against second third party dismissed.

Reported by Benjamin Yong